In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1580

T. SCOTT McVEA, PERCY CARRUTH, MALCOLM WASCOM, J. M. HOLLOWAY, E. L. GREEN and WILLIAM MORGAN, JR.,
Plaintiffs-Appellants

versus

BOARD OF DIRECTORS OF THE FEDERAL INTERMEDIATE CREDIT BANK,
Defendant-Appellee

On Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS OR AFFIRM

R. EMMETT KERRIGAN
Of Counsel

RALPH L. KASKELL, JR.
of
DEUTSCH,KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139
Attorneys for Board of Directors of the Federal Intermediate Credit Bank

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO.

T. SCOTT McVEA, PERCY CARRUTH, MALCOLM WASCOM, J. M. HOLLOWAY, E. L. GREEN and WILLIAM MORGAN, JR.,
Plaintiffs-Appellants

versus

BOARD OF DIRECTORS OF THE FEDERAL INTERMEDIATE CREDIT BANK,
Defendant-Appellee

On Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Louisiana on the grounds: 1) that the federal questions sought to be reviewed were not timely or properly raised or expressly passed on in the state courts; and 2) that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.[1]

The provisions of 28 U.S.C. § 2403 may be applicable.

---

1. Appellants have erroneously invoked this Court's jurisdiction under 28 U.S.C. § 1257(2). The Court may have jurisdiction pursuant to 28 U.S.C. § 1257 (3); in which case 28 U.S.C. § 2103 is controlling.

I.

STATEMENT

The appellee Bank had received information which convinced Bank officials that Phares, president of the Baton Rouge Production Credit Association (BRPCA), should be removed. Defendant so informed the appellants, who were then members of the Board of Directors of BRPCA. At first the Board complied.[2]

Subsequently, the BRPCA Board defied the Bank, reinstated Phares and took part in a series of acts questioning the authority of the Bank to supervise the BRPCA.[3]

The Bank proceeded under the BRPCA bylaws to determine whether the BRPCA Board should be removed.[4] On the trial of appellants' suit for reinstatement, the court found "that the Bank had good cause to remove the plaintiffs from the board of directors of BRPCA."[5] The Louisiana Fourth Circuit Court of Appeal found as a fact that appellants were guilty of "insubordination constituting 'good cause' for plaintiffs' removal."[6]

---

2. Jurisdictional Statement, Appendix A, p. 17.

3. *Id.*, pp. 17-18.

4. *Id.*, p. 17.

5. *Id.*, p. 21.

6. *Id.*, p. 18. In addition to the insubordination of reinstating Phares, appellants had "accused defendant of 'unreasonable interference' particularly with regard to the removal of Phares from the presidency of the Association. They characterized the conduct of defendant's president regarding Phares' removal as 'unwarranted interference' with their authority." *Id.*

The trial court had found also "that the removed directors were given the proper hearing and sufficient time to present their views on the removal."[7] The Court of Appeal found that: "Plaintiffs were given and did exercise the right to present their views in writing and orally at a meeting with defendant's board."[8]

The Court of Appeal noted that "Plaintiffs have never alleged or stated that the statutes or bylaws deprived them of procedural due process in violation of the Constitution of the United States."[9]

The Supreme Court of Louisiana in denying appellants' application for a writ of certiorari, held that: "On the facts found by the Court of Appeal, there is no error of law in the judgment complained of."[10]

II.

ARGUMENT

A. Federal Questions Not Timely or Properly Raised or Expressly Passed on in the State Courts

Neither in the pleadings in the trial court nor on appeal to the Court of Appeal did appellants raise a federal constitu-

---

7. *Id.*, p. 21.

8. *Id.*, p. 18.

9. *Id.*, p. 19, fn. 2.

10. *Id.*, p. 15.

tional question. Only on application for rehearing in the Court of Appeal did appellants claim that the Court of Appeal's interpretation of Section 260 of the bylaws deprived them of procedural due process in violation of the Constitution of the United States. The interpretation of the bylaws by the Court of Appeal was the same as that given by the trial court.[11]

Since appellants had not raised the constitutional question, the Court of Appeal did not expressly pass on it. Instead, the court stated that the issue was not before it.[12] In the Supreme Court of Louisiana appellants repeated the claim of lack of due process in violation of the Constitution of the United States, first raised on the application for rehearing in the Court of Appeal. The Supreme Court of Louisiana did not expressly pass on the issue.[13]

The constitutionality of the Farm Credit Act, 12 U.S.C. 2001 et seq., was challenged for the first time in this Court.[14]

The law in Louisiana is well-settled that issues neither raised by the pleadings nor passed upon by the trial court

11. *Id.*, pp. 18-19, 21.

12. *Id.*, p. 19 fn. 2. It is apparent that the opinion of the Court of Appeal led appellants to seek a new ground of relief, not theretofore urged in any manner by appellants.

13. Jurisdictional Statement, Appendix A, p. 15.

14. *Id.*, p. 3.

cannot be considered for the first time on appeal.[15]

Failure on the part of the appellants to raise federal questions at the proper time in the state court will preclude review by this Court. "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."[16]

Since Louisiana appellant courts will not consider issues raised the first time on appeal and since this Court is without power to consider federal questions not decided by the highest court of the state,[17] review by the Court is precluded.

The decisions of the Louisiana courts sustaining the Bank's removal of appellants from the Board of Directors of the BRPCA were based on the Farm Credit Act and the BRPCA bylaws promulgated thereunder. Failure on the part of appellants to challenge the constitutionality of the statutes and bylaws at the proper stage of the state court proceedings precludes review by the Court.

15. *Krauss Co. v. Develle*, 236 La. 1072, 110 So.2d 104 (1959); *Liquefied Petroleum Gas Comm'n v. E. R. Kiper Gas Corp.*, 229 La. 640, 86 So. 2d 518 (1956); *Novick v. Miller*, 222 La. 469, 62 So.2d 645 (1952); *Woodward, Wight & Co., v. National Box Co.*, 168 La. 701, 123 So. 296 (1929).

16. *Edelman v. California*, 344 U.S. 357, 358 (1953), *Accord: Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903).

17. *Street v. New York*, 394 U.S. 576, 581-82 (1969). "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Id.*, p. 582.

B. Questions Are So Unsubstantial As Not to Need Further Argument

The trial court made factual findings that "the Bank had good cause to remove the plaintiffs from the board of directorst of BRPCA" and "that the removed directors were given the proper hearing and sufficient time to present their views on the removal."[18] The Court of Appeal made similar factual findings.[19]

There was firm statutory and regulatory authority for the Bank's proceeding, as it did, under Section 260 of the BRPCA bylaws.

12 U.S.C. 2093 provides that "Each production credit association shall be . . . subject to supervision by the Federal intermediate credit bank for the district . . .".

The district board of directors of the Farm Credit district acts as the board of directors of the Bank for that district. 12 C.F.R. 611.1000(a).

Under 12 C.F.R. 611.1010:

> "The district board acting in that capacity or as the board of a bank, as appropriate, shall -
>
> (a) Adopt bylaws for the bank and approve bylaws for associations . . .in form approved by the Farm Credit Administration. Bylaws and amendments to bylaws proposed by a bank or association require Farm Credit Administration approval before implementation."

18. Jurisdictional Statement, Appendix, p. 21.

19. *Id.*, pp. 18-19.

The BRPCA was operating under bylaws approved by the Farm Credit Administration pursuant to statute and regulations issued thereunder.

Even if the Bank was engaged in governmental action, federal in character, "[t]he Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest."[20]

All Louisiana state courts have found that appellants received the hearing provided in Section 260 of the BRPCA bylaws. Appellants have pointed to no decision of this Court that supports their claim of lack of due process. No substantial question has been presented for decision by this Court

CONCLUSION

Appellee submits that the federal questions sought to be reviewed were not timely or properly raised or expressly passed on in the state courts of Louisiana and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellee moves to dismiss the appeal or, in the alternative, to affirm

20. *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886, 894 (1961). *See also: Crimmins v. Am. Stock Exch., Inc.*, 346 F. Supp. 1256, 1259 (S.D.N.Y. 1972), aff'd. on opinion below, 503 F.2d 560 (2nd Cir. 1974).

the judgment of the Supreme Court of Louisiana.

Respectfully submitted,

RALPH L. KASKELL, JR.
of
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139
581-5141
Attorneys for Appellee, Board of Directors of the Federal Intermediate Credit Bank

R.EMMETT KERRIGAN
Of Counsel

PROOF OF SERVICE

The undersigned attorney for Defendant-Appellee herein, a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 21st day of May, 1976, three (3) copies of the foregoing motion have been served on Rhett R. Ryland, Esq., of Kolb & Rooks, 1364 Nicholson Drive, P.O. Box 2831, Baton Rouge, Louisiana 70821, attorney for plaintiffs-appellants, and on the Solicitor General, Department of Justice, Washington, D.C., 20530 by depositing said copies in a United States Post Office or Mail Box, with first class postage prepaid, addressed to said respective counsel at their respective post office addresses. All parties required to be served have been served.

RALPH L. KASKELL, JR.